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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. ~~1198~~ 115

CARROLL DUNSCOMBE,
Petitioner,

vs.

BESSIE F. SAYLE, As Executrix of the Estate of Harold D. Sayle, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1964

No. .....

CARROLL DUNSCOMBE,
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BESSIE F. SAYLE, As Executrix of the Estate of Harold D. Sayle, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Carroll Dunscombe, a citizen and resident of the State of Florida, prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (1) to review the judgment of that court, entered January 13, 1965, dismissing Petitioner's appeal to that Court as frivolous and fining him for taking what the Court called a frivolous appeal (R. 43) and (2) to review the Order of that Court denying Petitioner's Petition for Rehearing, entered February 9, 1965 (R. 42).

JUDGMENT AND ORDER APPEALED FROM

On March 6, 1964, the United States District Court for Southern District of Florida, without a hearing, dismissed, without prejudice, Petitioner's Complaint in that Court, for lack of jurisdiction (R. 27).

Appeal from the Order of dismissal was taken by Petitioner to the United States Court of Appeals for the Fifth Circuit (R. 31), on the grounds that such Order violated Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution (R. 33, 34).

At the hearing January 4, 1965, on that Appeal, the Order of dismissal was affirmed from the Bench (R. 42), and on January 13, 1965, the Court of Appeals entered the following judgment (R. 43):

> "Per Curiam: As announced from the bench the Appeal is DISMISSED. It is patently a frivolous appeal. Double costs are awarded the Appellees as authorized by 28 U.S.C. 1912."

Petition for Rehearing was denied by Order entered February 9, 1965 (R. 72).

JURISDICTION OF THIS COURT

This Court has jurisdiction to review on certiorari the aforementioned Judgment of January 4, 1965, and aforementioned Order of February 9, 1965, of the Court of Appeals, under authorization in Section 1254, Title 28, United States Code.

STATEMENT OF QUESTIONS FOR REVIEW

1. Can a United States District Court dismiss, without a hearing, a Complaint alleging that the Plaintiff therein has been deprived of his property by a State Court without due process of law and in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. If one is deprived of his property by a State Court without due process of law and in violation of the Section 1 of the Fourteenth Amendment to the United States Constitution, is diversity of citizenship, or any amount involved, required to give the Federal Court jurisdiction, in view of the provisions of Article III, Section 2, Clause 1, of the United States Constitution, and of the implementing Sections 1331 and 1343 (3), Title 28, United States Code, and Sections 1981 and 1983, Title 42, United States Code?

3. Is an appeal frivolous when taken from a judgment dismissing without a hearing a Complaint alleging that the Plaintiff therein has been convicted of a serious criminal offense, and deprived of his property, by a State Court, without the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

4. Can a United States Court of Appeals assess damages against an appellant when his appeal is dismissed by that Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, Clause 1, of the United States Constitution.

The Fifth and Fourteenth Amendments to the United States Constitution.

Sections 1254 (1), 1912, 1331, 1343 (3), Title 28, United States Code.

Sections 1981 and 1983, Title 42, United States Code.

Rule 15, Federal Rules of Civil Procedure.

Florida Statutes as follows: Section 62.28 of 1931 Statutes (in force when the foreclosure action was filed), requiring a Complaint to be verified if interlocutory relief was sought; Section 733.16 of Statutes 1963 requiring claims against an estate to be filed within 6 months after first publication of Notice to Creditors; Section 733.18 of Statutes 1963, allowing one who has filed a claim against an estate, and to which objections have been filed, two calendar months to file suit to prove his claim.

Article 16, Section 21, Florida Constitution; as follows:

> "A certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as prima facie evidence thereof, and of its due execution with like effect as the original duly proved; provided that the original is not within the custody or control of the party offering such copy."

Section 12, Florida Bill of Rights, forbids a person being deprived of his property without due process of law.

STATEMENT OF THE CASE

Petitioner paid a $10,000.00 mortgage in the depths of the depression in 1931, by the conveyance of property (R. 4, 16). The banks were closed (R. 4, 16). The mortgagee, the father of deceased Administrator of his estate, satis-

fied the mortgage but failed to return the mortgage or note, as he claimed to have lost or mislaid them (R. 15, 16). He died some time thereafter. Shortly before the Statute of Limitations would have barred the claim, the Administrator of the decedent filed suit to foreclose the mortgage, although a satisfaction of the mortgage had been of record for five years (R. 3, 14, 15).

The Administrator made no attack on the recorded mortgage satisfaction (R. 3, 15). If fraud were claimed, he would have had to bring his suit within three years and return all the property that had been received in payment (R. 3, 15). If interlocutory relief by cancellation of the recorded satisfaction were asked, which was not, the Complaint would have to be sworn to. Reformation of the description in the mortgage of the property therein secured was not asked (R. 3, 15).

The trial came on at Stuart, Martin County, Florida, in the Court for that County (R. 2, 14).

As indicated above, the Complaint of the Administrator made no attack on the recorded mortgage satisfaction. It asked for no interlocutory relief by cancellation, was not sworn to, was never amended (R. 3, 15), and hence there was no issue as to the validity of the recorded mortgage satisfaction.

The defendant (Petitioner) pleaded payment and satisfaction of the mortgage, and exhibited paid cancelled checks to the mortgagee (R. 3, 4, 15, 16), and offered in evidence the certified copy of the recorded mortgage satisfaction (R. 4, 16), and accounted for the loss of the original of the satisfaction (R. 4, 16), under the provisions of Article 16, Section 21, of the Florida Constitution, as follows:

> A certified copy of any deed or mortgage that has been or shall be duly recorded according to law shall be

admitted as prima facie evidence thereof and of its due execution, provided that the original is not in the control or custody of the party offering it.

Petitioner also offered the deeds, and testimony, to show that when the $10,000.00 fell due in the depths of the depression in 1931, and banks closed, an accord and satisfaction had been reached, and the note paid by conveyance of real property and a mortgage (R. 4, 16). Confronted with such testimony as to how the debt had been paid, Plaintiff in that suit then admitted that the decedent had received the payment during his lifetime, but contended that it was for another debt (R. 4, 5, 16). Accordingly the burden shifted to the Plaintiff to prove that there was such other debt, and that the admitted payments had been applied to it, but no attempt was made for such proof, as there was no other debt (R. 5, 16). Therefore, it was in effect admitted that the mortgage and interest thereon had been paid to the holder during his lifetime, and the mortgage satisfaction executed and delivered, in recognition (R. 5, 16).

Toward the close of the trial, the Plaintiff's attorney offered in evidence an unidentified composite photostat, and so attempted to make it appear that the recorded mortgage satisfaction had been materially altered by the defendant (Petitioner) after its execution and before its recording (R. 5, 17). The witnesses and the notary for the satisfaction were not called to testify (R. 6, 17). Moreover, there could not have been any material alteration of the satisfaction of a paid mortgage (R. 6, 17).

Although as above stated there had been no attack on the recorded mortgage satisfaction, or prayer for such relief as cancellation, or verified Complaint (R. 6, 17), the trial Judge convicted the defendant (Petitioner) of

a felony with which he had never been charged (R. 6, 17, 18), holding that the defendant had materially altered the recorded mortgage satisfaction, and he ordered the satisfaction cancelled of record, and the mortgage foreclosed, thereby depriving Petitioner of his property without due process of law (R. 6, 17, 18). The Florida Supreme Court on Defendant's appeal affirmed, without an opinion, and later fined Defendant (Petitioner) (*Dunscombe* v. *Sayle,* 135 So.2d 224), and the decedent's Administrator thereafter had Petitioner and his wife forcibly evicted from their home to enforce the Judgment, and caused loss and damage to the contents of their home, and expense for storage and transportation (R. 8).

Thereafter, the Administrator having died, Petitioner lodged claim against his estate for damages of $250,000.00, and costs (R. 14-25), and when the claim was rejected (R. 25, 26), filed timely suit in the United States District Court for the Southern District of Florida (R. 1-13), to prove his claim. However, that Court on its own motion, and without a hearing, dismissed the suit, without prejudice (R. 27), the order of dismissal giving no reason therefor other than lack of jurisdiction (R. 27).

As hereinabove stated, Petitioner's Appeal from such Order to the United States Court of Appeals for the Fifth Circuit was dismissed as being frivolous, and double costs awarded to the Appellee (R. 43).

STATEMENT OF EVIDENCE IN THE CASE

There was no opportunity to offer any in the United States District Court or in the Court of Appeals.

GROUNDS FOR JURISDICTION OF THIS COURT

As stated hereinabove, the County Court for Martin County, Florida, entered a decree of foreclosure against Petitioner's property, although the question was not before the Court, nor raised or pleaded in the Complaint, and hence was not in issue, the Court's action having been based on a composite photostat introduced for the plaintiff purporting to show that the defendant (Petitioner) had materially altered the mortgage satisfaction after its execution, and before its recording (R. 5, 6, 17, 18). Petitioner has contended that the Order for foreclosure therefore was void, and that he was deprived of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the United States Constitution (R. 11, 17, 33, 46, 56).

Timely suit to prove his rejected claim for damages in enforcing a Judgment obtained without due process of law was filed by Petitioner in the United States District Court for the Southern District of Florida, but that Court on March 26, 1964, dismissed the suit on its own motion and without a hearing (R. 27, 28), such action having been alleged to be contrary to the provisions for due process of law provided for in the Fifth and Fourteenth Amendments to the United States Constitution (R. 33, 34).

Also, as stated hereinabove, the United States Court of Appeals for the Fifth Circuit on January 13, 1965 (R. 43), dismissed as frivolous Petitioner's Appeal from the Order dated March 26, 1964, and assessed double costs against him, and on February 9, 1965, denied rehearing (R. 73), the Court's such actions being stated as having contravened Petitioner's rights under the above Fifth Amendment.

This Court has jurisdiction to review the Orders of the Court of Appeals, under Title 28, Section 1254(1), United States Code.

Title 28, Section 1912, United States Code, referred to in the Order entered January 13, 1965 (R. 43), was not enacted to inhibit an appeal from what is considered to be an unsound Judgment.

Petitioner did not seek review by this Court of the Judgment of the Florida Supreme Court heretofore referred to, because he believed that no appeal lay from a decision which simply affirmed a void Judgment, as the decision would itself also be void. Having exhausted his remedies in the State Courts, Petitioner concluded that his only redress was in recourse to the Federal Courts, under the above cited provisions of the United States Constitution and Federal Statutes.

ARGUMENT

(a)

A United States District Court cannot dismiss, without a hearing, a Complaint alleging that the Plaintiff has been deprived of his property by a State Court without due process of law and in violation of the Fourteenth Amendment to the United States Constitution.

The United States District Court for the Southern District of Florida summarily and on its own motion entered an Order dismissing Petitioner's suit, on the ground that it had no jurisdiction (R. 27).

Section 11 of the Florida Bill of Rights preserved the right to a trial by jury, due process requiring that one be charged, and that he be allowed to defend against the charge, and to confront the witnesses. Petitioner was tried without a jury, and convicted by the State Court of a crime not charged, and without opportunity to defend, and his property taken by order for cancellation of the recorded mortgage satisfaction, and for foreclosure of the mortgage,

being thereby denied due process of law. *Crain* v. *United States*, 162 U.S. 625, 40 L. Ed. 1097.

> "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings the suit is master to decide what law he will rely upon . . .' and does determine whether he will bring 'a suit arising under the . . . [Constitution or laws] of the United States by his declaration or bill'. Jurisdiction is not defeated . . . by the possibility that the averment might fail to state a cause of action on which petitioner could actually recover. For it is well settled that a failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for lack of jurisdiction. Whether the Complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the Court has assumed jurisdiction over the controversy. . . . It is the established practice of this Court to sustain the jurisdiction of Federal Courts to issue injunctions to protect rights safeguarded by the Constitution, and to restrain individual State officers from doing what the 14th Amendment forbids the State to do." *Bell* v. *Hood*, 327 U.S. 678, 681, 682, 684.

> "How a suit shall be begun, whether by writ or informal notice, is a question of practice of the State or of its form and modes of procedure. The Constitution of the United States does not attempt to make a choice between one method and another. It provides only that the method employed 'gives reasonable notice and affords fair opportunity to be heard before the issues are determined'." *Chisholm* v. *Gilmer*, 299 U.S. 99, 102, 57 S. Ct. 65.

A Federal Court can dismiss a Complaint if it discovers that the Complaint is defective in the showing as to jurisdiction, but if after hearing it appears that the jurisdictional

statement can be amended, such amendment should be allowed. *Smith* v. *McCullough*, 270 U.S. 456, 460, 70 L. Ed. 682, 46 S. Ct. 338.

Rule 15(a) of the Federal Rules of Civil Procedure provides for amendment of pleadings if they are deficient.

In the instant matter, the United States District Court could have required the Plaintiff (Petitioner) to produce the record in the foreclosure suit, to ascertain whether the State Court ever had jurisdiction of the subject matter on which the Judgment was predicated.

(b)

If one is deprived of his property by a State Court without due process of law, and in violation of the First Clause of the Fourteenth Amendment to the United States Constitution, neither diversity of citizenship, nor any amount involved, is required to give the Federal Court jurisdiction, in view of Article III, Section 2, Clause 1, of the United States Constitution, and of the implementing Sections 1331 and 1343 (3), Title 28, United States Code, and Sections 1981 and 1983, Title 42, United States Code.

Under the Section 1331, Title 28, United States District Courts have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Under the Section 1343, Title 28, United States District Courts have original jurisdiction where a State had deprived a person of due process of law.

Neither diversity of citizenship nor amount in controversy is a prerequisite for Federal Court jurisdiction asserted under Section 1983, Title 42, United States Code. *Ortega* v. *Ragen*, (1954) 216 F.2d 561, certiorari denied 75 S. Ct. 786, 349 U.S. 940, 90 L. Ed. 1268. See also *Bat-*

tone v. *Lindsley et al.*, 170 F.2d 705; *Glicker* v. *Michigan Liquor Control Commission*, 160 F.2d 96.

Under Florida Statutes, torts of a deceased survive his death, and claims therefore can be filed against his estate. *Waller* v. *First Savings & Trust*, 138 So. 780, 103 Fla. 1024.

(c)

An appeal is not frivolous when taken from an Order dismissing without a hearing a Complaint alleging that the Plaintiff therein had been deprived of his property by a State Court without due process of law.

The Complaint filed by Petitioner in the United States District Court for the Southern District of Florida is carried in the record, pages 1-13. As will be noted, the jurisdiction of the Court was invoked at the outset (R. 1) under the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, in that "Plaintiff was tried and convicted of a felony with which he was never charged, and his property taken without due process of law, by the Florida Court and officials thereof". Damages of $250,000.00 were claimed in the Complaint (R. 13), which more than satisfied the jurisdictional requirement for amount involved.

Notwithstanding, the Court, on its own motion, and without a hearing, summarily dismissed the Complaint, without prejudice, for lack of jurisdiction (R. 27).

As Points on his Appeal to the United States Court of Appeals for the Fifth Circuit, Appellant (Petitioner) urged that (1) the United States District Court had "no summary jurisdiction to dismiss the Complaint without hearing, on its own motion", (2) the Complaint showed on its face that the "Plaintiff had been deprived of his rights guaranteed under the 5th and 14th Amendments of the United States Constitution, by the State Courts of Florida",

(3) the Plaintiff had exhausted all remedy to have the "void Judgment and proceedings based thereon vacated by the State Courts of Florida", (4) the Complaint showed that both the State and Constitutional rights of Plaintiff (Petitioner) had been violated by the State Courts of Florida "in that he had been tried and convicted of a serious criminal offense without a jury, in a County where the crime was not alleged to have been committed and without being advised of what offense he was claimed to have committed, as the Fifth Amendment to the United States Constitution [13] provided", (5) "Plaintiff's Constitutional right of due process of law guaranteed under the 14th Amendment has been violated and he has been deprived of his property without due process of law by the State Courts of Florida", (6) "the proceedings in the Federal District Court have deprived the Plaintiff of due process of law and his right to be heard" (R. 33, 34).

The action of the Court of Appeals in characterizing as frivolous an appeal predicated on the foregoing basic Points, and then dismissing the Appeal, with assessment of double costs against the Appellant, appears violative of the provisions of the Fifth Amendment to the United States Constitution, and should have this Court's review.

> "An appeal will not be dismissed as frivolous or taken merely for delay where examination shows that it presents a debatable, justiciable, or substantial question, where the questions raised necessitate an examination of the entire record, or where the appeal is taken from a void order." 5 *C.J.S.*, #1358, pages 438, 439 (Appeal and Error), citing numerous decisions in the footnote.
>
> "We cannot dismiss a case on motion simply because we may be of the opinion that it has been brought here for delay only. Both parties have the right to be heard on the merits, and one cannot require the other to come

to such a hearing upon a mere motion to dismiss. To dismiss under such circumstances would be to decide that the case had no merits." *Amory* v. *Amory et al.*, 91 U.S. 356, 357, 23 L. Ed. 436.

The earnestness and confidence with which an appeal is argued may show that the appeal was not frivolous and for delay. *Sullivan, Long, and Haggerty* v. *Washington*, 128 F.2d 466; *Atlantic Coast Line* v. *McKinley*, 84 F.2d 33; *Shevlin-Hixon Co.* v. *Smith*, 165 F.2d 170.

The record herein, 1-74, clearly shows the earnestness and confidence with which the Petitioner presented his appeal before the Court of Appeals.

(d)

An Appellate Court cannot assess damages against an Appellant when his Appeal is dismissed.

Title 28, Section 1912, United States Code, relied upon by the Court of Appeals in assessing double costs against Appellant (Petitioner) (R. 43), does not provide for damages on dismissal of an appeal but only on affirmance of the judgment appealed from.

The Section is as follows:

"DAMAGES FOR COSTS *ON AFFIRMANCE.*

"*Where a judgment is affirmed* by the Supreme Court or by a Court of Appeals, the Court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs. June 25, 1948, c. 646, 62 Stat. 954." (Emphasis supplied)

It was held in *McDonald* v. *Winfield Corporation*, 104 F. Supp. 609 (1952), in referring to the above Statute, that when a judgment *is affirmed*, the Appellate Court has discretion to award damages in the nature of a penalty, and if the Appellate Court does not award such damages, the

lower Court may not do so. See also *Lowe* v. *Willacy*, 239 F.2d 179 (1956).

A plaintiff whose Complaint has been dismissed by a lower Court without a hearing can gain no benefit by the delay of an appeal, nor can the defendant be damaged thereby, and the imposition of a penalty upon an appellant whose appeal is dismissed is an abuse of discretion, and inhibits those who consider that they have valid grounds for appealing from doing so.

Wherefore it is prayed that this Petition for Certiorari be granted, and that the United States Court of Appeals for the Fifth Circuit be required to certify and send to this Court the full transcript of proceedings in *Carroll Dunscombe, Appellant,* v. *Bessie F. Sayles, Executrix, Appellee,* Case No. 21592, for review by this Court of that Court's Orders of January 13, 1965 (R. 43), and of February 9, 1965 (R. 72).

Respectfully submitted,

John Wattam

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vs.

BESSIE F. SAYLE, AS EXECUTRIX OF ESTATE OF HAROLD C. SAYLE, DECEASED,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1964

No. 1138

CARROLL DUNSCOMBE,
Petitioner,

vs.

BESSIE F. SAYLE, AS EXECUTRIX OF ESTATE OF HAROLD C. SAYLE, DECEASED,
Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Petitioner was the plaintiff below. The Respondent was the Defendant below. Throughout this brief the Petitioner will be described as Petitioner and the Respondent will be described as Respondent. Italics are supplied except as otherwise noted.

The real history of this case is long and complex, involving numerous suits and appeals in both the Florida and Federal courts. For a full and complete understanding of the circumstances out of which the present case arose, the Respondent respectfully suggests that the Court refer to the Chronological Account attached to and made a part of a

Motion filed by the Respondent in the United States Court of Appeals for the Fifth Circuit, a certified copy of which has been filed by the Respondent with this Court under Rule 21(6), Revised Rules of the Supreme Court of the United States (1954), as an additional portion of the Record.

The instant suit was filed in the United States District Court for the Southern District of Florida on March 25, 1964, by the Petitioner.[1] The District Court determined that it had no jurisdiction over the cause, and, on its own motion, dismissed the Complaint without prejudice on March 26, 1964 (R. 27). Petitioner's Motion to Vacate the Order of Dismissal was denied by the District Court on April 21, 1964 (R. 28).

The Petitioner appealed from the Order of Dismissal of the United States District Court to the United States Court of Appeals for the Fifth Circuit (R. 31). On January 4, 1965, after hearing argument, the Court of Appeals affirmed the Order of Dismissal (R. 42), and on January 13, 1965, entered the following judgment (R. 43):

> "PER CURIAM: As announced from the bench, this appeal is DISMISSED. It is patently a frivolous appeal. Double costs are awarded the appellee as authorized by 28 U.S.C. § 1912."

Petition for re-hearing was denied by Order entered February 9, 1965 (R. 72). Petitioner now seeks to have this Court review the aforesaid Judgment and Order of the United States Court of Appeals for the Fifth Circuit.

---

1. He also, as attorney, filed a similar suit for his wife and the wife's suit was handled the same way by the District Court as was done in the within suit. The wife, unlike her husband, the Petitioner, did not appeal. Also, following the dismissal by the District Court of both cases, Dunscombe and his wife filed suits in the Florida State Courts. (See Chronological Account.) Both of these suits were dismissed with prejudice by the Florida Circuit Court on September 1, 1964. (Final Judgment Book 3, at page 366, Public Records of Martin County, Florida.) Appeals to the Florida Supreme Court were dismissed for lack of jurisdiction on February 3, 1965. *Dunscombe* v. *Sayle*, 173 So.2d 145 (1965).

QUESTIONS PRESENTED FOR REVIEW

Petitioner states four issues which he conceives to be raised by this appeal. Petitioner's phrasing of these issues is complex and redundant. In the interest of brevity, Respondent suggests that the real issues herein are as follows:

I.

Whether the United States District Court Had the Authority, on Its Own Motion, to Dismiss the Petitioner's Complaint Without Prejudice for Lack of Jurisdiction?

II.

Whether the United States Court of Appeals for the Fifth Circuit Had the Authority to Assess Double Costs Against the Petitioner for the Taking of a Patently Frivolous Appeal?

The argument in this brief is directed to all points raised in this petition, regardless of which statement of the issues is adopted.

ARGUMENT

I.

The United States District Court Had the Authority, on Its Own Motion, to Dismiss Petitioner's Complaint for Lack of Jurisdiction.

In his allegation of jurisdiction the Petitioner's complaint stated (R. 1):

> "This Court has jurisdiction of the parties and subject matter of this action under the Fifth and Fourteenth Amendments of the United States Constitution in that Plaintiff was tried and convicted of a felony

with which he was never charged and his property taken without due process of law, by the Florida Court and officials thereof."

The record affirmatively shows both parties to be residents of Martin County in the Southern District of Florida, therefore, it is obvious this is a non-diversity case.

In granting original jurisdiction to the United States District Courts in non-diversity cases, Congress provided in 28 U.S.C. § 1331(a) that:

> "The district courts shall have original jurisdiction of all civil actions *wherein the matter in controversy exceeds the sum or value* of $10,000.00 exclusive of interest and costs, *and arises under the Constitution, laws, or treaties of the United States.*"

It was under this statutory provision that the Petitioner Dunscombe sought to invoke the jurisdiction of the United States District Court for the Southern District of Florida.

A United States District Court is a court of limited jurisdiction and the cases over which it has cognizance are specifically limited. Its jurisdiction must be made apparent by affirmative allegations at the time that it is sought to be invoked, 1 Moore, Federal Practice, p. 630. The long recognized presumption is that the district court is without jurisdiction over a cause unless the contrary affirmatively appears from the record. *Birmingham Post Co.* v. *Brown*, 217 F.2d 127, 130 (5th Cir. 1954).

In the *Birmingham Post* case, it was held that no matter how the issue of the district court's jurisdiction may be raised, "whether by motion, by answer, *or upon the court's own initiative*, the burden of proving all jurisdictional facts rests upon the plaintiff or the person asserting that the court has jurisdiction;" and, it concluded: "The question of jurisdiction is self-asserting in every case. It arises even though

the litigants are silent. Even their consent cannot authorize cognizance if fundamental grounds of jurisdiction are absent." *Ibid.*

Thus, even though the court's jurisdiction may be unchallenged, the court may raise the issue on its own motion and dismiss the case. 1 Moore, Federal Practice, pp. 609-610. This in fact is the court's duty, it being obligated to raise the issue on its own motion, *sua sponte*, unless otherwise presented. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 59 S. Ct. 744 (1939).

When an amount in controversy is required in order to establish jurisdiction, a complaint filed in the district court is defective unless it contains a proper allegation as to the controverted sum. Such was the situation in *Canadian Indemnity Co.* v. *Republic Indemnity Co.*, 222 F.2d 601 (9th Cir. 1955), wherein the complaint alleged diversity of citizenship yet failed to allege any amount in controversy. *On its own motion*, the Court of Appeals dismissed the case for want of showing of the amount required to be in controversy.

The necessity of alleging that the matter in controversy is in excess of a certain given sum is clear when a complainant seeks to invoke the original jurisdiction of the district court. In Petitioner's complaint, no mention of the required amount in controversy was included as is so clearly required by 28 U.S.C. §1331. The Petitioner's complaint therefore, was defective in this regard, and this defect may properly be raised "by motion or in the responsive pleading; it may be raised for the first time at the appellate stage by either of the parties; *it may be raised by the trial and appellate courts on their own motion.*" Moore, Manual of Federal Practice and Procedure, p. 256 (1962).

There was still another defect in Petitioner's jurisdictional statement—its failure to allege a federal question.

Petitioner says his Constitutional rights were violated by the Florida Court and officials thereof "in that Petitioner was tried and convicted of a felony with which he was never charged and his property taken without due process of law."

In essence, the Petitioner attempted by this allegation to create a federal question. In this, we submit, he was not successful. The difficulty in stating a claim arising under the Constitution, treaties, and laws of the United States is not in setting forth an allegation of general federal question jurisdiction as the Petitioner attempted to do, but rather in following it up with a claim which "arises under the Constitution, laws, or treaties of the United States." 1 Bender, Federal Practice Forms, p. 121, at note 4 (1963). For federal question jurisdiction to be well founded, a right or immunity created by the Constitution or laws of the United States must appear as an essential element of the complaint. The action, furthermore, must revolve upon the federal issue, it not being sufficient if the federal question merely lurks in the background. *Gully* v. *First National Bank*, 299 U.S. 109, 117, 57 S. Ct. 96, 100 (1936). Furthermore, the claim based on that federal issue must not be frivolous or sham, made solely for the purpose of gaining jurisdiction. *Bell* v. *Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776 (1946); *Agnew* v. *City of Compton*, 239 F.2d 226 (10th Cir. 1956), cert. den. 353 U.S. 959, 77 S. Ct. 868.

Under 28 U.S.C. § 1331, the general federal question statute, a sum in excess of $10,000.00 is clearly required in order for the jurisdiction of the United States District Court to attach. In coming to this Court, however, the Petitioner has belatedly attempted to circumvent this requirement by framing his federal question as arising under 42 U.S.C. § 1981 and § 1983, the Civil Rights Act of 1870. We respectfully submit that the Petitioner has failed in this attempt.

In *Agnew* v. *City of Compton*, 239 F.2d 226 (1956) cert. den. 353 U.S. 959, 77 S. Ct. 868, the Court of Appeals for the 10th Circuit stated that "the plain purpose of these statutes is to provide for equality of rights between persons of different races." *Id.* at p. 230. Where the complaint fails to allege that a person was deprived of any right which under similar circumstances would have been accorded a person of a different race, it fails to state a claim arising under these sections. *Ibid.*

The complaint in the *Agnew* case (*supra*) alleged that Agnew was arrested without a warrant by two policemen who entered Agnew's premises, arrested him, seized some of his property, and transported him to jail in a police vehicle. The complaint further alleged that the acts complained of were committed wrongfully, maliciously, and while acting under cover of the police power of the City and that these acts were part of a conspiracy to deprive Agnew of federal rights secured by the Constitution of the United States and federal statutes. *Id.* at pp. 228-229. In considering the complaint, the Court concluded that it failed to state a claim arising under the Civil Rights Act of 1870 "absent allegations that the purpose of the arrest was to discriminate between persons or classes of persons." *Id.* at p. 231. As to Agnew's allegation that he had been denied his rights, privileges, and immunities under the United States Constitution, the Court stated that "general allegations of this kind, when unsupported by the complaint, read as a whole, have consistently been rejected as insufficient." *Ibid.* citing numerous cases at note 11.

Petitioner, in his long bout of litigation with Respondent's testator was no stranger to the District Court for the Southern District of Florida.[2] Nor could Petitioner's jousts

2. See Chronological Account, showing that chapter one of such bout had its debut in that District Court.

with the Florida Appellate Courts be unknown to that District Court in view of the somewhat staggering list of reported unsuccessful appeals of record.

A mere superficial knowledge of this record of appeals by the District Court would have convinced even the most patient Judge that Dunscombe had long since had "his day in Court" and was perilously close to obstructing justice by mis-use of the judicial processes. It was totally apparent that the jurisdictional statement was a sham. Being under the duty to examine its own jurisdiction before proceeding, the District Court discerned that the claim presented by the Petitioner in this case was obviously frivolous and made solely for the purpose of gaining jurisdiction. The District Court, faced with the sham statement of a federal question, a statement which in addition alleged no jurisdictional amount, was entirely correct in dismissing, on its own motion, yet another attempt by this Petitioner to re-hash and re-litigate matters long since decided adversely to him by many courts of competent jurisdiction.

II.

The United States Court of Appeals for the Fifth Circuit Had the Authority to Assess Double Costs Against the Petitioner for His Taking of a Patently Frivolous Appeal.

When an appeal is founded upon a federal question which is totally insubstantial and frivolous, this Court has held that either a judgment of affirmance or an order of dismissal is justified. The allowance of the one or the granting of the other as a practical question has the same effect. The federal question upon which the Court's jurisdiction depends is also the identical question upon which the merits depend, the two questions thus being coterminous. *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 33 S. Ct. 80 (1912).

Upon finding the Petitioner's appeal to be a patently frivolous one, the Court of Appeals dismissed the appeal and awarded double costs to the Respondent pursuant to the authority of 28 U.S.C. § 1912. The Petitioner contends, however, that the Court of Appeals lacked the authority to award double costs since it *dismissed* the appeal rather than *affirming* the judgment of the District Court.

As stated by Mr. Chief Justice White in the *Deming case* (*supra*):

> "The inquiry, then, narrows itself to this: Does the power to award the damages for delay which the statute confers in cases of affirmance give the authority to exert the power where, in form, there is no judgment of affirmance, but only an order of dismissal? To say that the duty to impose the statutory damage in such a case did not exist would require us to hold that things which were one and the same must be held to be different, and that the statute did not extend to and include that which in substance it embraced, because, by adhering blindly to mere form of words, the statute might be treated as not extending to an authority embraced within its spirit and purpose. . . . Indeed, the subject is further aptly illustrated by directing attention to the fact that it is not questioned that the power here obtains to direct the imposition of the penalty if the result of our conclusion that the Federal ground was frivolous be followed by an affirmance instead of an order of dismissal. Because of the absolute coincidence between a dismissal on account of the frivolous and unsubstantial character of the Federal question relied upon and an affirmance upon the same ground, we are of opinion that the statutory authority to impose the penalty obtains in either case."

Since it is clear that the Petitioner's appeal was patently frivolous, the Court of Appeals had the authority under 28 U.S.C. § 1912 to award double costs to the Respondent.

CONCLUSION

Confronted with a sham statement of a federal question and a failure to allege the requisite jurisdictional amount, the District Court, acting on its own motion, correctly dismissed yet another attempt by this Petitioner to re-hash and re-litigate matters long since decided adversely to him by many courts of competent jurisdiction

Upon consideration of Petitioner's appeal, the Court of Appeals correctly determined that it was patently frivolous. Its judgment dismissing the appeal and awarding double costs to Respondent was entirely correct and proper. Wherefore, Respondent prays that this Honorable Court dismiss this petition for writ of certiorari.

Respectfully submitted,

s/C. Robert Burns

C. ROBERT BURNS,

Attorney for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Brief for Respondent has been furnished by mail to JOHN WATTAWA, ESQ., 1317 F. St., N.W., Washington, D.C., Attorney for Petitioner, this 4th day of June, 1965.

s/C. Robert Burns

Attorney

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. [redacted]/~~314~~115

CARROLL DUNSCOMBE,
Petitioner,

vs.

BESSIE F. SAYLE, As Executrix of the Estate of Harold C. Sayle, Deceased,
Respondent.

REPLY BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~1138~~ 115

CARROLL DUNSCOMBE,

Petitioner,

vs.

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Respondent.

REPLY BRIEF FOR PETITIONER

I.

INVOLVEMENT OF THE REQUIRED JURISDICTIONAL AMOUNT WAS CLEARLY SHOWN

As stated in the Petition for Writ of Certiorari, pages 7, 12, damages of $250,000.00 were claimed in the Complaint filed by Petitioner in the United States District Court for the Southern District of Florida. (R. 1-13) Accordingly this amount, which more than satisfied the jurisdictional requirement, was affirmatively shown from the record as it existed. If, after or during trial, it was shown that less than the required amount was involved, then ac-

tion by the Court in dismissing for lack of jurisdiction would have been timely, but not before.

Respondent cites, page 4, from *Birmingham Post Co. v. Brown*, 217 F.2d 127, 130 (5th Cir. 1954), that the burden of proof of jurisdictional facts rests upon the plaintiff, or upon the person asserting that the Court has jurisdiction, which, it is submitted, implies that the plaintiff or person should have the opportunity of proving jurisdictional facts, and not be cut off from that basic privilege.

It was held in *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 59 S. Ct. 744 (1939), cited by respondent, page 5, that the question whether the Jurisdictional amount was involved in the District Court is determined by the record of that Court. (590)

INAPPLICABILITY OF RESPONDENT'S CITED CASES

It was held in *Canadian Indemnity Co.* v. *Republic Indemnity Co.*, 222 F.2d 601 (9th Cir. 1955), cited by Respondent, page 5:

> "The complaint sufficiently discloses diversity of citizenship, but neither in the complaint nor elsewhere in the record is there showing of the required amount in controversy." (603)

The Court added that the record is barren of any evidence to disclose any stated amount in controversy, either actual or claimed, and that no evidence to supply the lack of this essential allegation was received at the trial. (603)

Such circumstances do not prevail in the instant cause, in which the Complaints filed by Petitioner in the State Court and also in the United States District Court clearly claimed damages of $250,000.00. (R. 14-25; 1-13)

It was held in *Gully* v. *First National Bank*, 299 U.S. 109, 57 S. Ct. 96, 100 (1936), cited by Respondent, page 6:

> "A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed upon the face of the Complaint, unaided by the Answer or Petition for Removal." (113)

That cause involved removal from a Mississippi State Court to the United States District Court, and the Supreme Court of the United States ordered the cause remanded back to the State Court.

Certainly a genuine and present controversy, and not merely a possible or conjectural one, is shown in the above two Complaints which Petitioner filed.

It was held in *Bell* v. *Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776 (1946), cited by Respondent, page 6, that where a complaint in a Federal Court is so drawn as to seek recovery directly under the Constitution or laws of the United States, the Court must entertain the suit, except (a) where the alleged claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or (b) where it is wholly insubstantial and frivolous. The Court held that the contention of the respondent in that case did not show that petitioner's cause was insubstantial or frivolous, and that the complaint did in fact raise serious questions both of law and fact which the District Court could decide only after it had assumed jurisdiction over the controversy. (683, 684)

Certainly Petitioner's cause as set out in his Complaints was not insubstantial or frivolous, and raised questions both of law and fact. (R. 14-15; 1-13)

Agnew v. *City of Compton*, 239 F.2d 226 (1956), cert. den. 353 U.S. 959, 77 S. Ct. 868, cited by Respondent, page 7, does not rule that the plain purpose of Sections 1981 and 1983, 42 U.S.C., is to provide for equality of rights between persons of different races. Such ruling related to Sections 1981 and 1982, and not to Section 1983, with which the Court dealt separately (230), as follows:

> "We next consider 42 U.S.C.A. 1983. There is a line of cases holding that this Section authorizes an action only for deprivation of due process, but not for denial of equal protection. However we are unable to read such limitation into the Statute, since it refers, broadly, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. In our view, this Statute is not limited to due process violations."

SECTION 1912, TITLE 28, UNITED STATES CODE

It is axiomatic that a Statute providing for penalties should be strictly construed, and therefore the dicta or a ruling announced by this Court in 1912 (*Deming* v. *Carlisle Packing Co.*, 226 U.S. 102, 33 S. Ct. 80), cited in Respondent's Brief, page 8, ought not to be determinative with respect to the Captioned Statute enacted in 1948, but the latter should receive independent consideration and ruling.

Respectfully submitted,

JOHN WATTAWA
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Reply Brief for Petitioner has been furnished by mail to C. Robert Burns, Esquire, 205 Worth Avenue, Palm Beach, Florida, Attorney for Respondent, this ..... day of June, 1965.

.....

JOHN WATTAWA
Attorney for Petitioner

END